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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-674

THIRD NATIONAL BANK IN NASHVILLE,
Petitioner,

vs.

IMPAC LIMITED, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

BRIEF FOR PETITIONER

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INDEX

Opinions Below 1

Jurisdiction 2

Question Presented 2

Statute Involved 2

Summary of the Case 3

The Legislative History of Section 91 of the National Bank Act 6

Argument 12

I. The Decision Of The Tennessee Supreme Court Overrules Holdings Of The United States Supreme Court 12

A. The Mixter Decision 12

B. The Earle Decision 15

C. The Van Reed Decision 16

D. Lower Court Decisions 18

E. The Decision Below 23

II. The Decision Of The Tennessee Supreme Court Constitutes An Impermissible Infringement Upon The Authority And Prerogative Of Congress To Regulate National Banks 27

A. Congress, Not The States, Is Empowered To Regulate National Banks 27

B. The Power To Regulate National Banks Entails The Power To Create Special Privileges And Immunities For National Banks 27

C. The Tennessee Supreme Court's Construction Of Section 91 Deprives National Banks In Tennessee Of Powers And Privileges Possessed By National Banks In Other States 29

III. The Court Should Abide By The Established Meaning Of The Anti-Injunction Proviso And Reverse The Court Below 30

Conclusion 32

TABLE OF CASES

Agricultural National Bank v. *Tax Commissioner*, 392 U.S. 339 (1968) 31

American National Bank of Macon v. *Dure*, 148 Ga. 498, 97 S.E. 70 (1918) 22

Chesapeake Bank v. *The First National Bank of Baltimore*, 40 Md. 269, 17 Am. Rep. 601 (1874) 22, 23

Dennis v. *First National Bank of Seattle*, 127 Cal. 453, 59 P. 777 (1899) 22

Drewes & Co. v. *Ham & Seymour*, 103 So. 241 (La. 1925) 25

Earle v. *Pennsylvania*, 178 U.S. 449 (1900) 15, 16, 18, 23, 24, 25

First National Bank v. *La Due*, 39 Minn. 415, 40 N.W. 367 (1888) 23

First National Bank of Charlotte v. *Morgan*, 132 U.S. 141 (1889) 28

First National Bank of Oakland v. *Superior Court of California*, 240 Cal. App.2d 109, 49 Cal. Rptr. 358, *cert. denied*, 385 U.S. 829 (1966) 20

Flood v. *Kuhn*, 407 U.S. 258 (1972) 31

Freeman Mfg. Co. v. *National Bank of the Republic of Boston*, 160 Mass. 398, 35 N.E. 865 (1894) 11, 16, 18, 22, 26

Garner v. *Second National Bank of Providence*, 66 F. 369 (C.C.S.D. N.Y. 1895) 22

Hill v. *First National Bank*, 163 Ga. 458, 136 S.E. 437 (1927) 22, 29

Kemple v. *Security First National Bank of Los Angeles*, 57 Cal. Rptr. 838 (1967) 20, 21

McClain v. *Commissioner*, 311 U.S. 527 (1941) 31

McCulloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 27

Mercantile National Bank v. *Langdeau*, 371 U.S. 555 (1963) 28, 29

Metropolitan Lumber Co. v. *Fordham National Bank in New York*, 102 N.J.Eq. 514, 141 A. 742 (1928) 21

Meyer v. *First National Bank of Coeur d'Alene*, 10 Idaho 175, 77 P. 334 (1904) 22

Miller v. *Mercantile National Bank of Hammond*, 234 Ind. 202, 125 N.E.2d 720 (1955) 22

National Bank of North America v. *Associates of Obstetrics & Female Surgery*, 96 S.Ct. 1632 (1976) 28

National Bank of Savannah v. *Craven*, 147 Ga. 753, 95 S.E. 246 (1918) 20, 21

Pacific National Bank of Boston v. *Mixter*, 124 U.S. 721 (1888) 2, 12, 16, 18, 21, 23, 24, 25, 32

Planters' Loan & Savings Bank v. *Berry*, 91 Ga. 264, 18 S.E. 137 (1893) 22

Prentiss v. *Chandler*, 85 F.2d 733 (9th Cir. 1936) 25

Robinson v. *First National Bank of Plainview*, 45 F.2d 613 (N.D. Tex. 1930), *aff'd on other grounds*, 55 F.2d 209 (5th Cir. 1932) 22

Radzanower v. *Touche, Ross & Co.*, 96 S.Ct. 1989 (1976) 29

Rosenheim Real-Estate Co. v. *Southern National Bank*, 46 S.W. 1026 (Tenn.Ch.App. 1897) 23, 32

Safford v. *First National Bank*, 61 Vt. 373, 17 A. 748 (1889) 23

State ex rel. Southern Alaska Canning Co. v. *Superior Court for King County*, 222 P. 203 (Wash. 1924) 25, 26

Third National Bank in Nashville v. *Impac Ltd., Inc.*, 541 S.W.2d 139 (Tenn. 1976), *cert. granted*, 97 S.Ct. 731 (1977) 1, 2
Toolson v. *New York Yankees*, 346 U.S. 356 (1953) 31
Uhl v. *First National Bank & Trust Co. of Kalamazoo*, 24 F.Supp. 275 (W.D. Mich. 1935) 25
Van Reed v. *People's National Bank*, 198 U.S. 554 (1905) 16, 18, 21, 24, 25, 28

STATUTES CITED

Act of June 3, 1864, ch. 106, § 52, 13 Stat. 115 ..... 10, 28
Act of June 3, 1864, ch. 106, § 57, 13 Stat. 116 ..... 6, 7, 9, 10, 11, 12, 23, 28
Act of March 3, 1873, ch. 269, § 2, 17 Stat. 603 ..... 7, 8, 9
Act of February 18, 1875, ch. 80, 18 Stat. 320 ..... 10, 11
13 REVISED STATUTES, ch. III, § 34(15) (1873) 9
13 REVISED STATUTES, ch. VII, § 100(9) & (10) (1873) 9
13 REVISED STATUTES, ch. XXI (1873) 9
65 REVISED STATUTES, ch. IV at 52 (1873) 9
62 REVISED STATUTES § 5242 (1875) 10
62 REVISED STATUTES § 5198 (1878) 11
62 REVISED STATUTES § 5242 (1878) 11, 13, 15, 21, 22
12 U.S.C. § 86 (1970) 11
12 U.S.C. § 91 (1970) 2, 6, 11, 15, 21, 25, 26, 27, 29, 30, 32
12 U.S.C. § 94 (1970) 11, 12, 27, 28
15 U.S.C. § 78aa (1970) 29
T.C.A. § 23-2401 (1955) 27
T.C.A. §§ 64-1101 *et seq.* (1976) 4
T.C.A. § 35-501 (Supp. 1976) 5

OTHER AUTHORITIES

ANNOT., *Liability of Mortgagee for Damage Because of Wrongful Foreclosure or Improper Execution of Rightful Foreclosure*, 108 A.L.R. 592 (1937) 26
ANNOT., *Remedy of, and Damages Recoverable by, Mortgagor in Case of a Premature Sale Under Mortgage*, 97 A.L.R. 1059 (1935) 26
179 CONGRESSIONAL GLOBE, 870, 893 (1873) 8
180 CONGRESSIONAL GLOBE 2117, 2210 (1873) 8
DWAN & FEIDLER, *The Federal Statutes—Their History and Use*, 22 MINN.L.REV. 1008 (1938) 10
F. FRANKFURTER, *Some Reflections on the Reading of Statutes*, 47 COLUM.L.REV. 527 (1947) 31
NOTE, *Congressional Reversal of Supreme Court Decisions: 1945-1957*, 71 HARV.L.REV. 1324 (1958) 31
M. PRICE & H. BITNER, EFFECTIVE LEGAL RESEARCH (1953) 10
SENATE BILL No. 1378, *enacted as* Act of March 3, 1873, ch. 269, 17 Stat. 603 ..... 7, 8
TENTH ANNUAL REPORT OF THE COMPTROLLER OF THE CURRENCY (1872) 9
U.S. CONST. ART. VI 27

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court for the State of Tennessee, reported at 541 S.W.2d 139 (Tenn. 1976), appears at pages 70-78 of the Appendix (hereinafter "App."). The Chancellor's order granting Respondents' application for a temporary injunction is unreported and appears at App. 56. The Chancellor's unreported memorandum and order dissolving the temporary injunction and granting Respondents leave to perfect an interlocutory appeal to the Supreme Court of Tennessee appear at App. 65, 68.

JURISDICTION

The final order of the Supreme Court of Tennessee was entered on August 16, 1976 (App. 79). The petition for a writ of certiorari was filed on November 15, 1976 and was granted on January 10, 1977. 97 S.Ct. 731 (1977). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) (1970).

QUESTION PRESENTED

Whether, in light of 12 U.S.C. § 91 (1970) and *Pacific National Bank of Boston* v. *Mixter,* 124 U.S. 721 (1888), a state court has jurisdiction prior to a final judgment to enjoin a national banking association from foreclosing on its collateral.

STATUTE INVOLVED

Petitioner relies on Section 91 of the National Bank Act, 12 U.S.C. § 91 (1970), which provides as follows:

> All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this

> chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; *and no attachment, injunction, or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.* (Emphasis added).

SUMMARY OF THE CASE

This case arises from Petitioner's attempt to foreclose against collateral that secures a $700,000 construction loan upon which Respondents had defaulted. The relevant uncontroverted facts are as follows:

1. Petitioner is a national banking association organized under the National Bank Act and located in Nashville, Tennessee.

2. On May 18, 1973, Petitioner agreed to lend Respondents $700,000 to finance the construction of an office building. Respondents executed a deed of trust encumbering the real property and improvements in favor of Petitioner to secure the construction loan. Prior to borrowing the construction money from Petitioner, Respondents had arranged for First and Mid-South Mortgage Company to provide permanent financing upon completion of the building. (See the Permanent Lender's commitment letter at App. 9-12.) Petitioner was to provide only a construction loan of a limited duration as evidenced by the three-party agreement among Respondents ("Borrower"), Petitioner ("Temporary Lender"), and First and Mid-South Mortgage Company ("Permanent Lender") (App. 15-21). Pursuant to this agreement, Petitioner made a "pre-closed"

construction loan which assisted the borrower by insuring the primacy of the deed of trust over any liens or other adverse claims that might attach to the realty after construction began but before the permanent loan was funded and secured.[1]

3. Petitioner and the Permanent Lender twice agreed to honor Respondents' requests for extensions of time. Petitioner's original loan to Respondents matured on May 30, 1974 but was extended until December 2, 1974. A second extension was granted until March 14, 1975. Although Petitioner agreed to extend the loan a third time until July 31, 1975, Respondents failed to pay (and have never paid) the agreed upon extension fee. A more complete account of the loan appears at App. 37-47. Notwithstanding these extensions, the commitment for permanent financing expired on July 31, 1975. The Permanent Lender refused to make the permanent loan to Respondents based upon its determination that Respondents had not satisfied numerous necessary conditions (App. 48-53).

4. As of August 1, 1975, Respondents ceased paying interest due on the construction loan. On September 4, 1975, Petitioner, through its attorneys, notified Respondents that foreclosure proceedings would be commenced unless Respondents paid the principal, accrued interest and an

1. Under Tennessee's Mechanic's and Materialmen's lien statute, T.C.A. §§ 64-1101 *et seq.* (1976), a lien for services performed or materials supplied relates back, for purposes of establishing priority, to the date of the first visible commencement of operations at the job site. Consequently, a deed of trust recorded after work has commenced is subordinate to all liens filed against the project. In a "pre-closed" loan the permanent lender simply purchases the construction lender's note and deed of trust and thereby preserves the priority of the original deed of trust. This procedure also spares the borrower the expense of re-recording the deed of trust and paying the real estate transfer tax a second time.

unpaid extension fee (App. 47). The notice of foreclosure was first published on September 23, 1975.[2]

5. On September 26, 1975 Respondents filed a complaint in the Chancery Court of Davidson County, Tennessee seeking to restrain Petitioner from foreclosing under its deed of trust. At an *ex parte* hearing, the Chancellor issued a restraining order and ordered Petitioner to appear and show cause why a temporary injunction should not issue.

6. At the show cause hearing held October 14, 1975, the Chancellor issued a temporary injunction restraining Petitioner from foreclosing Respondents' commercial property (App. 56).

7. Petitioner immediately moved the Court to dissolve the injunction for lack of subject matter jurisdiction. In a memorandum filed December 9, 1975 and an order entered January 8, 1976, the Chancellor concluded that Section 91 of the National Banking Act "remove[s] the jurisdiction of the Court to grant temporary injunctions prohibiting the foreclosure of property in which the bank

2. In Tennessee, foreclosure under a deed of trust is not a judicial proceeding. Tennessee law recognizes the enforcement of a mortgage by means of a power of sale conferred on a trustee in a deed of trust executed by the mortgagor. The deed of trust enables the mortgagor, by contract, to convey legal title to a trustee for the purpose of securing the mortgagor's debt to the beneficiary of the conveyance. In the event the mortgagor fails to discharge the debt, or otherwise defaults under the deed of trust, the trustee is authorized and can be compelled by the beneficiary to sell the property conveyed in trust free of the mortgagor's equity of redemption.

T.C.A. § 35-501 (Supp. 1976) prescribes the publication of notice of foreclosure: "In any sale of land to foreclose a deed of trust, mortgage or other lien securing the payment of money or other thing of value or under judicial orders or process, advertisement of such sale shall be made at least three (3) different times in some newspaper published in the county where the sale is to be made. The first publication shall be at least (20) days previous to the sale . . . ."

has a security interest," dissolved the injunction, and granted Respondents leave to perfect an interlocutory appeal to the Supreme Court of Tennessee (App. 65-69).

8. With one justice dissenting and one not participating, the Supreme Court of Tennessee, *held, reversed.* Section 91 of the National Bank Act does not bar a state court from issuing a temporary injunction restraining a national bank from foreclosing on its collateral prior to a final judgment (App. 70).

9. This Court granted the petition for a writ of certiorari on January 10, 1977. 97 S.Ct. 731 (1977).

THE LEGISLATIVE HISTORY OF SECTION 91 OF THE NATIONAL BANK ACT

Section 91, in its present form, is the hapless progeny of inartful statutory codification. The legislative history of the anti-prejudgment injunction provision (hereafter referred to as "the anti-injunction proviso") demonstrates that, in this instance, the codifiers and revisers of the Acts of Congress have made the judiciary's task unnecessarily complicated, if not tedious.

By adopting Section 57 of the Act of June 3, 1864, Congress subjected national banks to suit in state courts.[3] The anti-injunction proviso (now an appendage to 12 U.S.C. § 91) was enacted in 1873 as an amendment to Section 57, to limit the remedies which state courts could grant against national banks prior to final judgment.

Section 57 originally read:

> That suits, actions, and proceedings against any association under this Act, may be had in any circuit,

3. Act of June 3, 1864, ch. 106, § 57, 13 Stat. 116.

> district, or territorial court of the United States held within the district in which such association may be established; or in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases; *Provided, however,* That all proceedings to enjoin the comptroller under this Act shall be had in a circuit, district, or territorial court of the United States, held in the district in which the association is located.

The anti-injunction proviso of the 1873 Amendment to Section 57 read:

> *And provided further,* That no attachment, injunction, or execution shall be issued against such association, or its property, before final judgment in any such suit, action or proceeding in any state, county, or municipal court.[4]

4. Act of March 3, 1873, ch. 269, § 2, 17 Stat. 603.

The anti-injunction proviso was introduced by Senator Sherman as part of Senate Bill No. 1378 which, in its entirety, read as follows:

An Act to require National Banks to restore their capital when impaired, and to amend the National Currency Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all national banks which shall have failed to pay up their capital stock, as required by law, and all national banks whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the Comptroller of the Currency, be required to pay the deficiency in the capital stock by assessment upon the shareholders pro rata, for the amount of capital stock held by each and the Treasurer of the United States shall withhold the interest upon all bonds held by him in trust for such association, upon notification from the Comptroller of the Currency, until otherwise notified by him; and if such banks shall fail to pay up their capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the Comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of the fiftieth section of the national currency act.

(Footnote continued on following page)

The Congressional Globe indicates that Senate Bill No. 1378, which contained the anti-injunction proviso was passed after its third reading by the Senate on January 27, 1873, without discussion. 179 CONG. GLOBE 870, 893 (1873). The bill was passed by the House without discussion on March 3, 1873, and was signed by President Grant later that day as Chapter CCLXIX of the Laws of the United States. 180 CONG. GLOBE 2117, 2210. 17 Stat. 603 (1873).

The caption of the 1873 Act is twofold: "[T]o require national banks to restore their capital when impaired, *and* to amend the National Currency Act" (emphasis added).

(Continued from previous page)

SEC. 2. That section fifty-seven of said act be amended by adding thereto the following: "*And provided further*, That no attachment, injunction, or execution shall be issued against such association, or its property, before final judgment in any such suit, action, or proceeding in any State, county, or municipal court."

SEC. 3. That all banks not organized, and transacting business under the national currency act, and all persons, companies or corporations doing the business of bankers, brokers, or savings institutions, except savings banks, authorized by Congress to use the word "national" as a part of their corporate name, are prohibited from using the word "national" as a portion of the name or title of such bank, corporation, firm, or partnership; and every such bank, corporation, or firm, which shall use word "national" as a portion of their corporate title or partnership name six months after the passage of this act, shall be subject to a penalty of fifty dollars for each day thereafter in which such word shall be employed as aforesaid as part of such corporate name or title, such penalty to be recovered by action in any court having jurisdiction.

SEC. 4. That it shall be the duty of the Comptroller of the Currency to cause to be examined each year the plates, dies, but-pieces and other material from which the national bank circulation is printed in whole or in part, and file in his office annually a correct list of the same; and such material as shall have been used in the printing of the notes of national banks which are in liquidation, or have closed business, shall be destroyed under such regulations as shall be prescribed by the Comptroller of the Currency, and approved by the Secretary of the Treasury; and the expense of such examination and destruction shall be paid out of any appropriation made by Congress for the special examination of national banks and bank plates.

The 1873 Act addresses four legally distinct aspects of the regulation of national banks: (1) correcting the impairment of capital stock; (2) prohibiting state court injunctions, attachments and executions prior to final judgment; (3) prohibiting non-national banking associations from using the word "national" in their business name or title; and (4) regulating the materials used to print national currency.

It is significant that John Jay Knox, the Comptroller of the Currency, did not request the anti-injunction proviso in his annual reports to the Congress which dealt, primarily, with the status of insolvent and failing national banks. *See, e.g.*, TENTH ANNUAL REPORT OF THE COMPTROLLER OF THE CURRENCY (1872).

In the process of codification, Section 57 of the National Bank Act of 1864, as amended by the anti-injunction proviso of 1873, disintegrated.

In the Revised Statutes of 1873 the venue provisions of Section 57, but not the anti-injunction proviso, were deleted from the Banking Code and transferred to the Judiciary Code.[5] It is significant that the list of "Acts and Parts of Acts Examined in the Revision of this Title [the Judiciary Code]" does not include the Act of March 3, 1873 (the anti-injunction proviso).[6]

Similarly, a search of the 1873 revision of the Banking Code (Title 65) reveals that the Act of March 3, 1873 was not among the acts considered by the Commission charged with the task of revising the Code. *See* 2 REVISED STATUTES OF 1873, Title LXV, ch. IV at 52 (1873).

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5. 1 REVISED STATUTES OF 1873, Title XIII, ch. III, Sec. 34(15) and ch. VII, Sec. 100(9) & (10) (1873).

6. 1 REVISED STATUTES OF 1873, Title XIII, ch. XXI at 263-75 (1873). The list of Acts, chronologically stated, stops with the Act of May 8, 1872.

Scholars agree that the 1873 revision of the Statutes at Large was not an overwhelming success. Messrs. Jacobstein and Mersky, in their introduction to the two volume set of the Revised Statutes of 1873, describe it as an "unhappy experience in statutory revision," while Professors Price and Bitner note that "the revision aroused so much dissatisfaction, because of errors in it and of the feeling that the revisers in many instances had exceeded their authority, that a second edition was published in 1878." M. Price & H. Bitner, EFFECTIVE LEGAL RESEARCH 29 (3rd ed. 1969).[7] *See also* DWAN & FEIDLER, *The Federal Statutes—Their History and Use*, 22 MINN. L. REV. 1008 (1938).

The 1873 reviser's failure to include the anti-injunction proviso to Section 57 was obviously an oversight, for in the Revised Statutes of 1875 it reappears, curiously enough, at the tail end of Section 52 of the Act of 1864 (which voided transfers of certain assets by insolvent national banks) as Section 5242 of Title 62 of the Revised Statutes of 1875.[8]

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7. The second edition was never re-enacted into positive law and is, therefore, "only *prima facie* the law, rebuttable by reference to the amending statute published in the Statutes at Large from which derived." PRICE & BITNER, *Id.*

8. Sec. 52 originally read: "That all transfers of the notes, bonds, bills of exchange, and other evidences of debt owing to any association, or of any deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by this Act, or with a view to the preference of one creditor to another, except in the payment of its circulating notes, shall be utterly null and void." Act of June 3, 1864, ch. 106, § 52, 13 Stat. 115.

Meanwhile, the venue provisions of Section 57 were returned to the Banking Code.[9] Unfortunately, in its haste to correct the 1873 Revision, Congress placed the Section 57 venue provisions at the end of what was Section 30 of the 1864 Act (Section 5198 of the Revised Statutes), which dealt with usurious interest charges by national banks.

By 1878 the revisers had managed to completely mangle the codification of the law. Title 62 of the Revised Code of 1878 shows the venue provisions of Section 57 attached as a separate sentence to a section dealing with usury (§ 5198) and the anti-injunction proviso of Section 57 appended by a mere semicolon to a section voiding transfers by insolvent national banks (§ 5242).[10]

Unfortunately, the confusion of the Revised Statutes was carried forward to some degree to the United States Code. For example, 12 U.S.C. § 91 restates verbatim the transfers by insolvent banks/anti-injunction melange of Section 5242 of the Revised Statutes of 1878.

On the other hand, the hapless union of the venue provisions of Section 57 and the usury provisions of Section 30 has been dissolved. Today the usury provisions appear as Section 86 of the National Bank Act, 12 U.S.C. § 86 (1970), while the venue provisions now stand alone as Section 94 of the National Bank Act, 12 U.S.C. § 94 (1970). Accordingly, it remains for this Court to read the anti-injunction proviso in its proper context as though

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9. Act of Feb. 18, 1875, ch. 80, 18 Stat. 320. Justice Holmes concluded that Section 57 had been "omitted by mistake from the Revised Statutes" but that "[T]his omission was corrected" by 18 Stat. 320. *Freeman Mfg. Co.* v. *National Bank of the Republic of Boston*, 160 Mass. 398, 35 N.E. 865, 866 (1894).

10. Revised Statutes of the United States, Title LXII, ch. III, Sec. 5198 at 1005 and ch. IV, Sec. 5242 at 1013-14 (1878).

it were placed alongside the venue provisions of Section 57, now 12 U.S.C. § 94 (1970).[11]

ARGUMENT

I.

The Decision Of The Tennessee Supreme Court Overrules Holdings Of The United States Supreme Court.

Although this Court has interpreted the anti-injunction proviso on three separate occasions, the thrust of these opinions was ignored by the Tennessee Supreme Court.

A. The Mixter Decision

The case of *Pacific National Bank of Boston* v. *Mixter*, 124 U.S. 721 (1888) stands for the proposition that the anti-attachment/injunction proviso "as it stood originally as part of Section 57 after 1873, and as it stands now in the Revised Statutes" operates as a prohibition on prejudgment attachments (and injunctions) issued against national banks by state courts. 124 U.S. at 726.

The *Mixter* case arose when George Mixter and others sued the Pacific National Bank of Boston and attached large deposits owned by the defendant in the possession of other banks. To alleviate the adverse impact of the attachment, the Pacific National Bank agreed to execute a bond in favor of Mixter and other plaintiffs. The bond, in turn, was secured by the guaranties of two individuals. To insure that the individual guarantors would be indemnified if called on to perform, the bank transferred to them a large certificate of deposit (later replaced by securities). As agreed, when the bond was executed and secured, the attachment was dissolved. Thereafter, the Comptroller of the Currency placed the bank in the hands of a Receiver for purposes of liquidation. The Receiver unsuccessfully sought the dismissal of the cases brought by Mixter and others. After several of the plaintiffs reduced their claims to judgment, the Receiver filed a bill in equity to recover the bank's securities held by the sureties and to have the bond and the sureties' obligations declared void on the grounds that the original attachment was illegal and void under Section 5242 of the Revised Statutes.

11. It is not surprising that Congress has not adopted Title 12 of the United States Code as positive law.

On appeal, Mixter claimed that the anti-prejudgment attachment/injunction proviso was not controlling because Section 5242 concerns only insolvent banks, whereas the Pacific National Bank was solvent when the attachment issued. The Court's analysis of Mixter's arguments squarely controls this appeal:

> The fact that the amendment of 1873 in relation to attachments and injunctions in state courts was made a part of Section 5242 shows the opinion of the revisers and of Congress that it was germane to the other provision incorporated in that section, and was intended as an aid to the enforcement of the principle of equality among the creditors of an insolvent bank. But however that may be, it is clear to our minds that, as it stood originally as part of Section 57 after 1873, and as it stands now in the Revised Statutes, it operates as a prohibition upon all attachments against national banks under the authority of the state courts. That was evidently its purpose when first enacted, for then it was part of

a section which, while providing for suits in the courts of the United States or of the State, as the plaintiff might elect, declared in express terms that if the suit was begun in a state court no attachment should issue until after judgment. *The form of its re-enactment in the Revised Statutes does not change its meaning in this particular. It stands now, as it did originally, as the paramount law of the land that attachments shall not issue from state courts against national banks, and writes into all state attachment laws an exception in favor of national banks. Since the Act of 1873 all the attachment laws of the State must be read as if they contained a provision in express terms that they were not to apply to suits against a national bank.*

• • •

Although the provision was evidently made to secure equality among the general creditors in the division of the proceeds of the property of an insolvent bank, its operation is by no means confined to cases of actual or contemplated insolvency. The remedy is taken away altogether and cannot be used under any circumstances.

It was further said that if the power of issuing attachments has been taken away from the state courts, so also is the power of issuing injunctions. That is true. (Emphasis added). 124 U.S. at 726-27.

Mr. Chief Justice Waite concluded that since the attachment was illegal and the bond was simply a substitute for the attachment, the bond was unenforceable. Accordingly, the case was reversed and remanded.

B. The Earle Decision

The Court had a second occasion to review Section 5242 (now 12 U.S.C. § 91 (1970)) in *Earle* v. *Pennsylvania*, 178 U.S. 449 (1900). The *Earle* case arose when the State of Pennsylvania, having obtained a judgment for $31,499 against James Long, obtained an alias writ against Mr. Long's bank, the Chestnut Street National Bank of Philadelphia, as garnishee. The bank filed an answer to the proceeding and an answer to special interrogatories admitting that it held funds for Long's benefit. A few days later the bank closed its doors and the Comptroller of the Currency appointed Mr. Earle as its Receiver. Mr. Earle moved the Court of Common Pleas to vacate the attachment served upon the bank-garnishee under Section 5242 of the Revised Statutes. His motion was denied and the Court ordered the bank to pay over a deposit of $2,900 with interest and the value of stock it held as collateral in excess of Long's debt to the bank. The Supreme Court of Pennsylvania affirmed. The United States Supreme Court affirmed in part and reversed in part. The opinion, written by Mr. Justice Harlan, does not discuss the legislative history of the proviso and cites no cases. It simply holds:

> Whatever may be the scope of section 5242, an attachment sued out against the bank *as garnishee* is not an attachment against the bank or its property, nor a suit against it, within the meaning of that section. It is an attachment to reach the property or interests held by the bank for others. 178 U.S. at 454.

Significantly, the Court reversed that part of the decision ordering the payment of interest accrued on Long's deposit and ordering the sale of stock held by the bank as pledgee.

Earle is not inconsistent with *Mixter*. The attachment did not affect the bank's pecuniary interests. The bank was a mere stakeholder holding funds belonging to another. The fact that the bank was a mere garnishee and not a party to the controversy is controlling. Indeed, that part of the trial court's order which would have affected the bank's ability to deal with its own collateral was reversed; the attachment was sustained only insofar as it affected Mr. Long's deposit in which the bank claimed no interest.

C. The Van Reed Decision

In any event, the Supreme Court quickly laid to rest any possibility that its holding in *Earle* might overrule or seriously limit the *Mixter* decision in the case of *Van Reed* v. *People's National Bank*, 198 U.S. 554 (1905). This case arose when Mr. Van Reed commenced an action against the People's National Bank of Lebanon, Pennsylvania by levying an attachment upon the bank's funds in New York. The bank, which was solvent, appeared specially and moved to vacate the attachment pursuant to section 5242 of the Revised Statutes. Its motion was denied, but the Appellate Court reversed and both the Court of Appeals of New York and the Supreme Court of the United States, speaking unanimously through Mr. Justice Day, affirmed. One of two questions raised on appeal was whether a national bank is "exempt from attachment before judgment under section 5242":

> We deem the answer to the first question already determined by the decision of this court in *Pacific Nat. Bank* v. *Mixter*, 124 U.S. 721, 31 L.Ed. 567, 8 Sup. Ct. Rep. 718. The right of Congress to determine to what extent a state court shall be permitted to entertain actions against national banks, and how far these institutions shall be subject to state control, is

> undeniable. National banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress, and are not to be interfered with by state legislative or judicial action, except so far as the lawmaking power of the government may permit.
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> The language of the latter clause of this section [the anti-attachment/injunction proviso] would seem to be too plain to admit of discussion as to its meaning. It in terms forbids the issuing of an attachment, injunction, or execution against a national bank or its property before final judgment in any suit, action, or proceeding in any state, county, or municipal court. This was the view taken by this court in *Pacific Nat. Bank* v. *Mixter* . . . .
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> Since the rendition of that decision it has been generally followed as an authoritative construction of the statute holding that no attachment can issue from a state court before judgment against a national bank or its property. [Citations omitted]. It is argued by the plaintiff in error that the decision in the *Mixter Case*, . . . should be limited to cases where the bank is insolvent; but the statement of facts in that case shows that, at the time when the attachment was issued, the bank was a going concern and entirely solvent so far as the record discloses. The language of Chief Justice Waite, above quoted, is broad and applicable to all conditions of national banks, whether solvent or insolvent; and there is nothing in the statute, which is likewise specific in its terms, giving the right

of foreign attachment as against solvent national banks. *We find nothing in the case of Earle* v. *Pennsylvania,* 178 U.S. 449, 44 L.Ed. 1146, 20 Sup. Ct. Rep. 915, *which qualifies the decision announced in the Mixter Case.* We therefore conclude that the Mixter Case is applicable here, and the decision therein announced meets with our approval. 198 U.S. at 557-59. (Emphasis added).

The Court's interpretation of the anti-attachment/injunction proviso in *Mixter, Earle* and *Van Reed* has been followed almost universally by the lower courts.

D. Lower Court Decisions

Not surprisingly, the most widely cited opinion on point is *Freeman Mfg. Co.* v. *National Bank of the Republic of Boston,* 160 Mass. 398, 35 N.E. 865 (1894), written by Mr. Justice Holmes. In *Freeman,* plaintiffs, having executed promissory notes in favor of the Potter Lovell Company, obtained a preliminary injunction against the bank enjoining it from transferring their notes which the payee, allegedly, had wrongfully pledged to the bank. The Superior Court dissolved the injunction, but one Justice of the Supreme Judicial Court of Massachusetts suspended the decrees of the Superior Court and the bank appealed. Characteristically, Justice Holmes disposed of the legal issue efficiently and correctly:

> In Rev. St. U.S. § 5242, after provisions avoiding payments made in contemplation of insolvency, etc., the section continues: "And no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any state, county, or municipal court." Possibly these words, if enacted in their pres-

> ent connection for the first time, might be limited to insolvent banks. Raynor v. Bank, 93 N.Y. 371. But this clause is simply a codification of a proviso added to Stat. U.S. 1864, c. 106, § 57 (13 Stat. 116, 117), giving jurisdiction over banks to state, as well as to United States, courts, by Stat. U.S. 1873, c. 269, § 2 (17 Stat. 603). It cannot be limited in that way. Bank v. Mixter, 124 U.S. 721, 726, 727, 8 Sup. Ct. 718. There is nothing in the context to limit it in any other. The argument is only that it is unreasonable that Congress should go so far; that the presumable motive for the law was to prevent an important wheel of business being stopped; and that this motive could be satisfied by limiting the injunctions mentioned to such as would place the general assets of the bank beyond its control, by mesne process having the effect of an attachment.
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> But such arguments are very doubtful ground for giving words an unnatural construction. The words used are of unlimited scope. The limited interpretation gives them an unusual meaning. The prohibition, whether reasonable or not, is intelligible when we consider that, at the time when the prohibition was first passed, any plaintiff was at liberty to sue in the United States courts, and could obtain an injunction there. The fact that this power has been taken away cannot change the construction of the words. Bank v. Mixter, 124 U.S. 721, 727, 728, 8 Sup.Ct. 718. The jurisdiction and the extent of the power to be exercised by state courts depend on the permission of the United States. The wrongs likely to be done by national banks are of a pecuniary nature, and the banks usually are amply able to make good any damage which they may do, so that

there is not the same necessity for preventive remedies that there is with individuals or with corporations, for whose solvency less stringent precautions are taken. We are of opinion that the language of the statute must be read in its natural sense, in accordance with what we understand to have been the view of the supreme court of the United States in Bank v. Mixter, supra. 35 N.E. at 866.

Other decisions holding that Section 91 deprives state courts of subject matter jurisdiction to temporarily enjoin a national bank from foreclosing on its collateral include *First National Bank of Oakland* v. *Superior Court of California*, 240 Cal. App.2d 109, 49 Cal. Rptr. 358, *cert. denied*, 385 U.S. 829 (1966); *Kemple* v. *Security First National Bank of Los Angeles*, 57 Cal. Rptr. 838 (1967); *National Bank of Savannah* v. *Craven*, 147 Ga. 753, 95 S.E. 246 (1918); *Metropolitan Lumber Co.* v. *Fordham National Bank in New York*, 102 N.J.Eq. 514, 141 A. 742 (1928).

In *First National Bank of Oakland* v. *Superior Court of California, supra*, the bank and the Northern California Business Investment Company were beneficiaries of separate deeds of trust encumbering all or part of the same property. They disagreed on the question of priority. When the mortgagor defaulted under both deeds of trust, the investment company obtained a temporary restraining order prohibiting a foreclosure sale by the bank under its deed of trust. At the hearing to dissolve the temporary restraining order, which took place shortly before the scheduled hour of sale, the court asked the bank to delay for two hours while it reviewed the bank's authorities and attended to other matters. When the bank refused, the court refused to dissolve its restraining order. Nevertheless, the bank conducted the sale and bid in the property. After a hearing on an order to show cause the Superior Court held the bank in contempt, fined it $500 and vacated the sale. The Appellate Court annulled the Superior Court's contempt orders on the ground that it acted "beyond its jurisdiction" in issuing the temporary restraining order.[12]

In *Kemple* v. *Security First National Bank of Los Angeles*, 57 Cal. Rptr. 838 (1967) the court held that the trial court properly denied plaintiffs' motion for a preliminary injunction because it lacked jurisdiction to temporarily restrain a national bank from foreclosing under the terms of its deed of trust, notwithstanding the plaintiffs' claim that they were fraudulently induced to sign an agreement which subordinated their vendors' lien and right of re-entry to the bank's deed of trust.

In *National Bank of Savannah* v. *Craven*, 147 Ga. 753, 95 S.E. 246 (1918) the plaintiff-mortgagor interpleaded the amount of the debt and sought a temporary injunction to enjoin the mortgagee, a national bank, from foreclosing under a power of sale contained in the mortgage securing the debt. The Supreme Court of Georgia *held*, the prohibitory language in Section 5242 prevents an injunction prior to a final judgment in the case.

Similarly, in *Metropolitan Lumber Co.* v. *Fordham National Bank in New York*, 102 N.J.Eq. 514, 141 A. 742 (1928) the lower court was required to dismiss a bill to

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12. "Although the earlier clauses of the same section deal with insolvent national banks, the legislative history makes clear that this qualification does not limit the last clause (of Section 91). The proscription of state court attachment or injunction before final judgment 'is by no means confined to cases of actual or contemplated insolvency.' Rather, it bars the interim remedy in state courts as to any national bank."

The Court did not set aside the order vacating the sale holding that Section 91 does not remove this remedy from state courts.

temporarily enjoin a national bank from exercising its rights under a mortgage and an assignment of rents based on *Mixter, supra, Van Reed, supra,* and *Freeman Mfg. Co., supra.*

The clear meaning of the statute, which was correctly expressed in *Mixter,* has been applied practically without exception by the lower federal and state courts in this country. *See, e.g.,* Robinson v. First National Bank of Plainview, 45 F.2d 613 (N.D. Tex. 1930), *aff'd on other grounds,* 55 F.2d 209 (5th Cir. 1932) (dissolving temporary injunction); Garner v. Second National Bank of Providence, 66 F. 369 (C.C.S.D. N.Y. 1895) (holding service of process by means of prejudgment attachment of bank's assets void under Section 5242 and vacating the attachment); Dennis v. First National Bank of Seattle, 127 Cal. 453, 59 P. 777 (1899) (affirming order dissolving prejudgment attachment); Hill v. First National Bank, 163 Ga. 458, 136 S.E. 437 (1927) (upholding trial court's refusal to issue preliminary injunction); American National Bank of Macon v. Dure, 148 Ga. 498, 97 S.E. 70 (1918) (prejudgment injunction dissolved); Planters' Loan & Savings Bank v. Berry, 91 Ga. 264, 18 S.E. 137 (1893) ("This policy may be wise or unwise, wholesome or unwholesome, but in either event it is the one established by competent legislative authority, and must be respected and enforced accordingly."); Meyer v. First National Bank of Coeur d'Alene, 10 Idaho 175, 77 P. 334 (1904) (affirming dissolution of preliminary injunction); Miller v. Mercantile National Bank of Hammond, 234 Ind. 202, 125 N.E.2d 720 (1955) (sustaining demurrer to complaint seeking temporary injunction to prevent national bank from disposing of account balance); Chesapeake Bank v. The First National Bank of Baltimore, 40 Md. 269, 17 Am. Rep. 601

(1874);[13] First National Bank v. La Due, 39 Minn. 415, 40 N.W. 367 (1888) (declaring void a prejudgment attachment of bank funds); Rosenheim Real-Estate Co. v. Southern National Bank, 46 S.W. 1026 (Tenn.Ch.App. 1897) (vacating prejudgment attachment); Safford v. First National Bank, 61 Vt. 373, 17 A. 748 (1889) (reversing judgment overruling bank's motion to dismiss pre-judgment attachment as a means to obtain service of process).

E. The Decision Below

Without so much as a cursory examination of either the plain language of the anti-injunction proviso or its legislative history, the Tennessee Supreme Court summarily disregarded the well-developed body of case law correctly applying it.[14] Without citing authority in the

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13. The *Chesapeake Bank* case is interesting because it was decided only one year after the anti-attachment/injunction proviso was enacted, and 14 years prior to *Mixter.* The decision also precedes the unfortunate codification efforts of the Revised Statutes of 1873, which were not published until 1875. The opinion correctly treats the anti-attachment proviso as an amendment to Section 57 of the National Bank Act of 1864 and holds that "the power to create these banks as instrumentalities of the government, being, as it confessedly is, within the rightful powers of Congress, we cannot say that provisions like these defining in what tribunals they shall be sued and to what suits or actions they shall be subjected, are not appropriate and necessary to carry out this admitted power. It must plainly appear that such provisions are inappropriate and unnecessary for this purpose, in order to justify a court in declaring that Congress has transcended its authority in enacting them. In our opinion Congress has the power to make any provisions which tend to promote the efficiency of these banks in performing the functions by which they were designed to serve the Government, and to protect them, not only against interfering State legislation, but also against suits or proceedings in state courts by which that efficiency would be impaired." 40 Md. at 272-73.

14. The Court avoids the impact of *Mixter* and its progeny by reading *Earle* v. *Pennsylvania, supra,* to limit the holding in *Mixter* to its facts and by concluding that the numerous decisions following *Mixter* are based on "blind reliance on *dicta* in the federal cases." In light of the actual holding in *Earle,* which upheld

(Footnote continued on following page)

language of the statute or the cases construing it, the Tennessee Court concluded that the anti-injunction proviso is limited to instances in which a national bank's creditor endeavors to reach its assets. The Tennessee Court held that the anti-injunction proviso does not apply to "a situation in which a debtor of a national bank is seeking, by interlocutory injunction, to protect *his* property from wrongful seizure and foreclosure by the bank." (App. 73).

The anti-injunction proviso affords absolutely no basis for sophistic distinctions between actions brought by a creditor from actions brought by a debtor. In either case, the bank's property rights may be imperiled. As Justice Brock noted in his dissent:

> The distinction made in the majority opinion be-between state court actions brought by *debtors* of a national bank and those brought by *creditors* of a national bank is, in my opinion, not a valid one because the harm to the national bank defendant is the same whether the injunction is sought by a debtor or a creditor. [Citing authorities] A temporary injunction by a debtor restraining foreclosure of a deed of trust belonging to the bank constitutes interference with the assets of the bank in the same way as does an attachment by a creditor of the same deed of trust (App. 78).

A preliminary injunction against a lender restraining its rights of foreclosure is a judicial act which clearly interferes with the bank's property rights and with the

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the garnishment of a depositor's account in which the national bank-garnishee claimed no interest but reversed the garnishment insofar as it affected the bank's disposition of its collateral, the Court's reliance on *Earle* appears misplaced. In any event, the Court evidently overlooked the *Van Reed* decision which states that *Earle* in no way limits *Mixter*.

bank's management and control of its assets. A preliminary injunction against a bank's contractual right of foreclosure is as much an action against a bank's assets as was the illegal attachment of the bank's funds in the *Mixter* and *Van Reed* cases. In many instances the harm which results from unwarranted and precipitous interference with collateral held by a national bank is as great as the harm from interference with a bank's own funds.

In an effort to justify its result, the Tennessee Supreme Court adverted to certain factors which bear upon the wisdom of the anti-injunction proviso.[15] Among these

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15. Respondents' Brief in Opposition to the Petition for Writ of Certiorari cites four cases to support the proposition that Section 91 does not deprive state courts of subject matter jurisdiction to temporarily enjoin a national bank from foreclosing on its collateral: *Prentiss* v. *Chandler*, 85 F.2d 733 (9th Cir. 1936); *Uhl* v. *First National Bank & Trust Co. of Kalamazoo*, 24 F.Supp. 275 (W.D. Mich. 1935); *Drewes & Co.* v. *Ham and Seymour*, 103 So. 241 (La. 1925); and *State ex rel. Southern Alaska Canning Co.* v. *Superior Court for King County*, 222 P. 203 (Wash. 1924).

However, *Prentiss* v. *Chandler*, *supra*, and *Uhl* v. *First National Bank and Trust Co. of Kalamazoo*, *supra*, concern Section 52 of the original Bank Act, which came in as the voidable transfers portion of Section 91. Neither case involves the Section 57 portion of 12 U.S.C. § 91 proscribing temporary injunctions.

The case of *Drewes & Co.* v. *Ham and Seymour*, *supra*, held that a state court may temporarily enjoin a national bank from paying a draft against a letter of credit as ancillary relief in an action brought by the maker of the credit against the beneficiary. The case is distinguishable from the case of a national bank foreclosing on its collateral: "The main object of the suit is to annul the contract between the plaintiff and Ham & Seymour in which the bank has no direct or pecuniary interest and with which the bank has no concern." 103 So. at 244. Thus, as in *Earle* v. *Pennsylvania*, *supra*, the bank was a disinterested stakeholder, which differs markedly from a mortgagee.

In *State ex rel. Southern Alaska Canning Co.* v. *Superior Court for King County*, *supra*, the Bank of California sought to foreclose a chattel mortgage by placing the notice of sale with the sheriff of King County, Washington. The mortgagor instituted a proceeding to transfer the foreclosure to the superior court of King County. The court thereupon issued a temporary

(Footnote continued on following page)

are the adequacy of other judicial remedies and the absence of federal court jurisdiction.

Even though the remedy of a temporary injunction is removed by Section 91, a national bank still must act at its peril when its foreclosure action is questioned. After a final judgment, a wrongful foreclosure may be voided and set aside. Also, a party damaged by wrongful foreclosure is entitled to money damages which is the traditional remedy for the wrongful taking of property. ANNOT., *Liability of Mortgagee for Damage Because of Wrongful Foreclosure or Improper Execution of Rightful Foreclosure*, 108 A.L.R. 592 (1937); ANNOT., *Remedy of, and Damages Recoverable by, Mortgagor in Case of a Premature Sale Under Mortgage*, 97 A.L.R. 1059 (1935).

While the Tennessee Court is correct in concluding that the federal district court would not have jurisdiction in the present case, this consideration has absolutely no bearing upon the proper construction and application of the anti-injunction proviso contained in Section 91. Mr. Justice Holmes laid this argument to a sound and solid rest in *Freeman Mfg. Co.* v. *National Bank of Boston*, 160 Mass. 398, 399, 35 N.E. 865, 866 (1894).

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injunction staying the action of the sheriff. "The *sole question before us* is where a mortgagor has instituted proceedings to transfer to the Superior Court a pending foreclosure by notice and sale given by the sheriff of his chattel mortgage, must he give a bond before the court will restrain the sheriff from further proceedings?" 222 P. at 203. Accordingly, the Chancellor (in the instant case) concluded: "So the injunction in [the South Alaska Canning] case was not to restrain the Bank from foreclosing but was to restrain the sheriff from proceeding after, under the laws of that state, an action had been instituted to transfer the foreclosure to the Superior Court. The action was not to stop the foreclosure but to transfer it to the court." (App. 68). Thus, it is manifest that *South Alaska Canning Company* does *not* stand for the proposition that a state court has jurisdiction to temporarily enjoin a national bank from foreclosing on its collateral.

In short, while the factors addressed by the Tennessee Supreme Court might appropriately be the subject of legislative consideration bearing upon the wisdom of the statute, these factors are of no proper assistance in determining the construction of the anti-injunction proviso.

II.

The Decision Of The Tennessee Supreme Court Constitutes An Impermissible Infringement Upon The Power Of Congress To Regulate National Banks.

A. Congress, Not The States, Is Empowered To Regulate National Banks.

Since *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), when the Court declared unconstitutional a state tax on the bank of the United States, the primacy of Congress over the States with respect to the regulation of national banks has been an established doctrine of constitutional law. In addition, it is fundamental that state law must yield to the Acts of Congress when the two conflict. U.S. Const., art. VI.

In the instant case, the Tennessee Supreme Court held that the anti-injunction proviso of 12 U.S.C. § 91 (1970) must yield to Tennessee's foreclosure statute, T.C.A. § 23-2401 (1955), which confers upon Chancery Courts the power to enjoin a foreclosure sale prior to final judgment.

B. The Power To Regulate National Banks Includes The Power To Create Special Privileges And Immunities For National Banks.

Perhaps the best example of a privilege and immunity peculiar to national banks is the venue restriction contained in 12 U.S.C. § 94 (1970).

Because the venue provisions were derived from Section 57 of the National Banking Act of 1864, which Congress amended in 1873 by adding the anti-injunction proviso, the case law interpreting Section 94 is especially relevant to a consideration of Section 91.

In *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555 (1963) the Court analyzed the history of the special venue provisions of Section 94 which permit national banks to be sued in state and federal courts sitting within the district in which the association was established.

Following its holding in *First National Bank of Charlotte* v. *Morgan*, 132 U.S. 141 (1889) that Section 57 "conferred a personal privilege on the banks exempting them from suits in state courts outside their home counties," the Court concluded "that the statute must be given a mandatory reading." 371 U.S. at 561-62. This conclusion was based, in part, on the federal character of national banks best articulated in *Van Reed, supra*:

> "National banks are quasi-public institutions and for the purposes for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress and are not to be interfered with by state legislative or judicial action, except so far as the lawmaking power of the Government may permit." Van Reed v. People's Nat. Bank, 198 U.S. 554, 557, 49 L ed 1161, 1162, 25 S.Ct. 775. Unquestionably Congress had authority to prescribe the manner and circumstances under which the banks could sue or be sued in the courts .... 371 U.S. at 559-60.[16]

16. *See* National Bank of North America v. Associates of Obstetrics & Female Surgery, 96 S.Ct. 1632 (1976).

More recently, the controlling nature of the federal legislative policy governing national banks was noted in *Radzanower* v. *Touche, Ross & Co.*, 96 S.Ct. 1989 (1976), which held that the special venue provision found in Section 94 of the National Bank Act is not supplanted by the more general venue provision of Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1970).[17]

C. The Tennessee Supreme Court's Construction Of Section 91 Deprives National Banks In Tennessee Of Powers And Privileges Possessed By National Banks In Other States.

Given the consistent construction of Section 91 by the courts of many states, it is obvious that a national bank foreclosing in Tennessee is subject to restrictions it would not encounter foreclosing in Georgia, Massachusetts, or California.[18]

17. In his dissenting opinion, Justice Stevens notes:

> "The source of the special venue statute for national banks is the Act to provide a national Currency enacted in 1863 and amended in 1964. When these statutes were enacted, Congress apparently assumed that the newly authorized national banks would not be subject to suit in state courts unless Congress gave its express consent. The fact that the statute was phrased in permissive language suggests that Congress' primary purpose was to give such consent. The mandatory construction given to that language a century later when the Court decided *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, is consistent with that purpose because it is unlikely that the Civil War Congress intended to authorize the several States to subject national banks to the potential harassment of defending litigation in places other than the county or city where the bank was located." 96 S.Ct. at 1996-97.

18. The anomaly of the Tennessee Court's holding is illustrated by a hypothetical instance in which a national bank holds a mortgage on a tract of real property located in both Tennessee and Georgia. Foreclosure could not be enjoined in Georgia prior to a final judgment [Hill v. First National Bank, 163 Ga. 458, 136 S.E. 437 (1927)], but could be enjoined in Tennessee at any time, without regard to a final judgment.

The novel construction of Section 91 by the Tennessee Supreme Court creates an unwarranted inconsistency in the federal framework which the Congress has created for the regulation of its corporate creations, national banks. The Tennessee Court's construction of Section 91 is repugnant to the notion of uniformity in the federal policy of regulating legal actions against national banks.

III.

The Court Should Abide By The Established Meaning Of The Anti-Injunction Proviso And Reverse The Court Below.

The Congress spoke in plain language in 1873 when it enacted the anti-injunction proviso to limit the jurisdiction of state courts which it had conferred in 1864. The legislative history and the case law interpreting the proviso militate strongly against the construction placed upon the statute by the Tennessee Supreme Court.

The court below ignored the admonition of Justice Frankfurter:

> [T]hat the function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature. The great judges have constantly admonished their brethren of the need for discipline in observing the limitations. A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation. He must not read out except to avoid patent nonsense or internal contradiction. F. FRANKFURTER, *Some Reflections on the Reading of Statutes*, 47 COLUM.L.REV. 527, 533 (1947).

Moreover, as the Court noted in *Agricultural National Bank* v. *Tax Commissioner*, 392 U.S. 339, 345 (1968), "the banking field has traditionally been an area of particular congressional concern marked by legislation responsive to new problems." Although Congress has had sufficient opportunity to amend or repeal the anti-injunction proviso, it has not seen fit to do so.[19] Accordingly, any change in the meaning of the statute should be deferred to Congress. *See, e.g.*, Flood v. Kuhn, 407 U.S. 258 (1972); Toolson v. New York Yankees, 346 U.S. 356 (1953).

The anti-injunction proviso merely limits the availability of a particular type of state court remedy against a national bank. It does not prohibit permanent injunctions issued after a final hearing on the merits. Neither does it prevent an action for damages for the wrongful foreclosure or disposition of collateral or an action to set aside the transfer of property wrongfully sold at foreclosure. It merely prohibits interlocutory relief that could disrupt and interfere with the operations of national banks. If the statute produces hardship in particular instances, it is for the Congress to consider and respond.[20]

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19. NOTE, *Congressional Reversal of Supreme Court Decisions: 1945-1947*, 71 HARV.L.REV. 1324 (1958).

20. *See, e.g.*, McClain v. Commissioner, 311 U.S. 527, 530 (1941) ("[W]e must apply the statute as we find it, leaving to Congress the correction of asserted inconsistencies and inequalities in its operation.")

CONCLUSION

The decision of the Tennessee Supreme Court cannot be squared with the plain meaning of the statute or with its legislative history or with the three leading decisions of this Court, which leave no room for argument or doubt. Nor can the Tennessee Court's holding be squared with the overwhelming weight of authority in this country.[21]

Admittedly, the Court is called upon to apply a federal statute which creates a favorable judicial immunity for national banks. The response of the Tennessee Court was to fashion an unwarranted amendment to Section 91.

The Tennessee decision constitutes an impermissible infringement on the historic, federally created right of national banks to be free from prejudgment injunctive process. If not reversed, the decision of the Supreme Court of Tennessee creates an exception that is so broad and so substantial that it vitiates the statute, overrules *Mixter* and *Van Reed*, and invites further unwarranted interference by state courts in this area.

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21. Indeed, so intent on reaching its desired result was the Tennessee Court that it failed to cite the only reported case in which the Tennessee Appellate Courts had previously considered (and followed) the *Mixter* decision. *Rosenheim Real-Estate Co.* v. *Southern National Bank*, 46 S.W. 1026 (Tenn.Ch.App. 1897) involved a suit against a national bank for conversion of bonds plaintiff had placed with the bank for safekeeping. The trial court issued a prejudgment attachment against certain funds due the bank and enjoined certain bank debtors from paying the bank. Following *Mixter*, the appellate court reversed, holding that no prejudgment attachment or preliminary injunction would lie against a national bank. The report states that the decision was "Affirmed orally by Supreme Court, July 18, 1898."

Accordingly, the decision of the Supreme Court of Tennessee should be reversed and the temporary injunction dissolved.

Respectfully submitted,

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